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STATE OF WASHINGTON
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NO. 79661-1

SUPREME COURT OF THE STATE OF WASHINGTON

TESORO REFINING AND MARKETING COMPANY,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

RESPONSE TO BRIEF OF AMICUS CURIAE ASSOCIATION OF WASHINGTON BUSINESS

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I. INTRODUCTION

The Association of Washington Business's ("AWB") argument relies on rules of statutory construction of ambiguous statutes. This case does not involve ambiguous statutes. RCW 82.21.030 taxes possession of a hazardous substance. Under the plain language of RCW 82.21.020(3), possession exists when an entity has the power to sell *or* use a hazardous substance. Although AWB offers alternative ways the tax could have been imposed, they cite to nothing in RCW 82.21 to support their reading of the law. Since the language of RCW 82.21 is plain and unambiguous, the rules for construction of ambiguous statutes are inapplicable.

WAC 458-20-252(7)(b) ("Rule 252(7)(b)") properly administers RCW 82.21 by ensuring the tax is assessed only once on each possession. However, if the Court reads Rule 252(7)(b) as AWB and Tesoro ask, then the rule would conflict with RCW 82.21, and would be invalid. AWB's position that an invalid rule trumps a statute finds no support in the law.

II. ARGUMENT

A. The Rules Of Statutory Construction Do Not Apply When Reading The Plain Language Of RCW 82.21.020(3).

As the Court of Appeals correctly recognized, when the statute is plain and unambiguous, the rules of statutory construction are not applicable. "When a statute is not ambiguous, only a plain language

analysis of a statute is appropriate." *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). That is the case here.

1. RCW 82.21.020(3) plainly states that a hazardous substance is possessed if there is "power to sell *or* use" the substance.

The tax at issue is plain on its face. RCW 82.21.030(1) imposes a tax on "possession of hazardous substances in this state." The statutory definition of "possession" is set out in RCW 82.21.020(3), which states:

> "Possession" means the control of a hazardous substance located within this state and includes both actual and constructive possession. "Actual possession" occurs when the person with control has physical possession. "Constructive possession" occurs when the person with control does not have physical possession. "Control" means the power to sell or use a hazardous substance or to authorize the sale or use by another.

Under the plain language, control is the "power to sell *or* use" a hazardous substance. The phrase is written in the disjunctive. Possession exists if Tesoro has the power to use a hazardous substance, or if it has the power to sell the hazardous substance. Tesoro meets the statutory definition of possession because it has the power to use its refinery gas as a fuel source.

AWB contends RCW 82.21.020(3) is ambiguous because the legislature could have limited the definition of possession to situations in which there is power to both sell *and* use a hazardous substance. Br. of AWB at 8. In making this argument, AWB ignores the many cases in

which this Court has stated that "or" is read in the disjunctive, and will not be changed to "and" unless "the act itself furnishes cogent proof of the legislative error." *E.g., State v. Tiffany*, 44 Wash. 602, 604, 87 P. 932 (1906); *Cerrillo*, 158 Wn.2d at 204; *State v. Bolar*, 129 Wn.2d 361, 366, 917 P.2d 125 (1996). Like Tesoro, AWB points to nothing in RCW 82.21 indicating an intention to impose the tax only if a taxpayer has power to both sell *and* use the substance.

AWB contends that striking the word "or" and replacing it with "and" would further an intent to tax only substances that threaten human health or the environment. Br. of AWB at 8. AWB's argument has no support in the law. On the contrary, the tax applies to *all* substances statutorily designated as hazardous substances, including *all* petroleum products. RCW 82.21.020(1), .030(1). The term "hazardous substance" is defined to include four types of substances. RCW 82.21.020(1). Substances the Department of Ecology determines are a threat to health or the environment are only one of four categories of substances defined as a hazardous substance. RCW 82.21.020(1)(d). "Petroleum products" are a separate category of substances included within the definition of a hazardous substance. RCW 82.21.020(1)(b).

The Court of Appeals judge concurring in part and dissenting in part makes the same error, referring to the tax as a "pollution tax" intended

to "exempt[] from taxation those hazardous substances not released into the environment". *Tesoro Ref. & Mktg. Co. v. State,* 135 Wn. App. 411, 429, 144 P.3d 368 (2006) (Quinn-Brintnall, C.J., concurring in part and dissenting in part). There is no such exemption in the statute. RCW 82.21 does not impose a tax on pollution, or on business activities that threaten pollution, or on hazardous substances released into the environment. Rather, it plainly and simply imposes a tax on possession of statutorily designated hazardous substances, including all petroleum products.[1] RCW 82.21.030. When a statute is clear on its face, "its meaning is to be derived from the language of the statute alone." *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). Since RCW 82.21.020(3) is plain and unambiguous, the rules of statutory construction are inapplicable. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.,* 146 Wn.2d 1, 12, 43 P.3d 4 (2002).

2. The plain meaning of a statute is discerned from what the legislature said in the statute and related statutes, not from an agency's interpretation.

The meaning of an unambiguous statute is determined by looking at the plain language. The plain meaning of a statute "is discerned from

[1] Even if the act were so limited, AWB does not explain how its position that imposing the tax only when the taxpayer has the power to "sell *and* use" a hazardous substance poses less of a threat to human health or the environment than the power to "sell *or* use" a hazardous substance.

all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* at 11.

AWB contends the Court must determine the plain meaning by "harmonizing" the statute with the administrative rule. Br. of AWB at 7-8. This argument has been soundly rejected. Where, as here, the language of a statute is plain, the Court does not defer to administrative rules to determine the legislature's intent. The Court does not defer to an agency's interpretation unless the underlying statute is ambiguous, even if the agency's interpretation is stated in a rule. *E.g., Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2007); *Edelman v. State ex rel. Pub. Discl. Comm'n,* 152 Wn.2d 584, 590, 99 P.3d 386 (2004).

In contending that the Court must harmonize the plain language of a statute with administrative rules, AWB cites only *Emwright v. King Cy.*, 96 Wn.2d 538, 637 P.2d 656 (1981). Br. of AWB at 7-8. *Emwright* does not discuss administrative rules and is inapposite. In *Emwright,* the Court addressed a separation of powers issue by harmonizing a *court* rule with a statute regarding jury fee deposits. The Court noted that, at times, there is an "overlapping" of authority between the legislature and the courts. *Id.* at 543. Because of that overlapping authority, the Court attempts to harmonize court rules and statutes addressing the same subject. *Id.*

There is no separation of powers issue in the present case. Without question, the Court has "the ultimate authority to interpret a statute". *E.g., Bostain,* 159 Wn.2d at 716. When the law is plain, the Court does not defer to administrative interpretations of the law, or attempt to "harmonize" the law with administrative rules. There is also no overlapping authority to impose hazardous substance tax or create exemptions from the tax. The legislature alone possesses that authority, and it has not delegated such authority to the Department of Revenue.

B. Consistent With RCW 82.21, Rule 252(7)(b) Prevents Double Taxation Of The Same Substance.

The Department of Revenue reads Rule 252 consistently with the law, "to impose a tax only once for each hazardous substance." RCW 82.21.010. Rule 252(7)(b) ensures that the tax is assessed just once by providing that a substance is not separately taxed if it "becomes a component or ingredient of the product being manufactured or processed or is otherwise consumed during the manufacturing processing activity." For example, assume 10 gallons of substance A are mixed with 10 gallons of substance B to form 20 gallons of product C. RCW 82.21.030 assesses tax only once on each substance. It would conflict with the law to tax substances A and B as individual substances, and then again as part of the total volume of the end product, substance C. Refinery gas is used as a

fuel to heat the exterior of refinery boilers. It is never added to the ingredients being heated.[2] Since the fuel is not consumed in the product, there is no risk of the refinery gas being taxed twice.

Reading Rule 252(7)(b) consistently with RCW 82.21 to prevent double taxation also complies with the ejusdem generis rule, which provides that when general terms are used in connection with specific terms, the specific terms restrict the application of the general terms. Under the ejusdem generis rule, the general term "or otherwise consumed" is restricted by the specific examples of becoming "a component or ingredient of the product." *See, e.g., Gibson v. Dep't of Licensing*, 54 Wn. App. 188, 192-93, 773 P.2d 110 (1989) (applying ejusdem generis rule to statutory term "otherwise in a condition rendering him incapable of refusal"); *Dean v. McFarland*, 81 Wn.2d 215, 500 P.2d 1244 (1972) (applying rule to statutory term "otherwise improving").

The potential for double taxation is not present in this case. Refinery gas is not at risk of being subjected to tax multiple times, first as a separate substance and then as a component of the final product. If a hazardous substance is purchased, and used as a source of heat to run a factory, the first possession of that substance is subject to tax. The tax implication is precisely the same for Tesoro, which is the first possessor of

[2] CP 163 (Crawford Deposition at 23, lines 5-23).

the refinery fuel it creates. Whether the fuel gas is purchased or created by the taxpayer, there is no risk of double taxation.

C. AWB's Plea To "Hold The Department" To A Reading Of Rule 252 That Is Not The Department's Reading And That Would Put The Rule In Conflict With RCW 82.21 Is Unsound.

As the Department explained in its Supplemental Brief and briefs in the Court of Appeals, the reading of Rule 252(7)(b) sought by AWB would reinstate an exemption for fuel gas that was removed from the law by Initiative 97. The Department of Revenue's reading of Rule 252(7)(b) does not seek to override the law and provide a new exemption for fuel gas. If the Court accepts AWB and Tesoro's expansive reading of the Rule, the new exemption would be invalid. This Court has cautioned that "[a]n agency may not legislate under the guise of the rule making power. Rules must be written within the framework and policy of the applicable statutes. They may not amend or change enactments of the legislature." *E.g., Kitsap-Mason Dairymen's Ass'n v. Wash. State Tax Comm'n*, 77 Wn.2d 812, 815, 467 P.2d 312 (1970) (citations omitted).

If a tax rule conflicts with the law, it is invalid and taxpayers have no right to rely on it. *Coast Pac. Trading, Inc. v. Dep't of Rev.*, 105 Wn.2d 912, 917-18, 719 P.2d 541 (1986). The Department of Revenue's rules "'cannot properly carve out an exemption . . . when the statute makes

no such exemption.'" *Id.* at 917, *quoting Budget Rent-A-Car of Wash.-Or., Inc. v. Dep't of Rev.*, 81 Wn.2d 171, 176, 500 P.2d 764 (1972).

In support of its argument that taxpayers are entitled to rely on invalid rules, AWB cites only *Group Health Co-op. of Puget Sound, Inc. v. Wash. State Tax Comm'n*, 72 Wn.2d 422, 433 P.2d 201 (1967), and ignores the Court's rulings in *Coast Pacific* and *Budget.* Unlike Tesoro, the Tax Commission told Group Health that its specific business practices entitled it to a tax deduction. Later, the Commission changed its position, stated that the same business practices did not entitle Group Health to a tax deduction, and assessed the tax for past periods. The Court ruled that the agency could not retroactively impeach its own ruling because of asserted errors of fact, judgment, or discretion. *Id.* at 428.

Unlike Group Health, Tesoro was not told that its business practices entitled it to a tax exemption. On the contrary, the Department of Revenue instructed Shell Oil, the prior owner of Tesoro's refinery, that it must pay hazardous substance tax on its possession of refinery gas. Shell Oil filed a case in the Board of Tax Appeals, seeking a refund of the tax. The Board of Tax Appeals accepted the Department of Revenue's reading of RCW 82.21 and Rule 252, and found that the hazardous substance tax was properly assessed on refinery gas produced and burned at the refinery. *Shell Oil Co. v. State,* BTA No. 93-28 at 21 (1997).

AWB contends that if Rule 252(7)(b) conflicts with the law, it would be "unfair" to collect tax pursuant to the law from taxpayers that relied "in good faith" on the rule. Br. of AWB at 11. In light of the *Shell Oil* case, it is difficult to understand AWB's point. Presumably, AWB is referring to the Excise Tax Advisory (ETA) discussed in Tesoro's Supplemental Brief. Supp. Br. at 13-14. ETA 540.04 was published in 1988 and discussed RCW 82.22, not RCW 82.21.[3] It explained the exemption for "fuel gas used in petroleum processing" contained in the prior version of the hazardous substance tax. ETA 540 was superseded by Initiative 97, which eliminated the statutory exemption for fuel gas.

III. CONCLUSION

The Department of Revenue requests the Court of Appeals' decision be affirmed.

RESPECTFULLY SUBMITTED this 14th day of January, 2008.

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[3] In 1988, these publications were called Excise Tax Bulletins (ETBs). In 1998, ETA 540 was converted from an ETB to an ETA. This was not a "readoption" of the bulletin. It was simply an administrative change that was made to the title of all ETBs.

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TESORO REFINING AND MARKETING COMPANY, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Respondent.	DECLARATION OF SERVICE

I, Becky Waldron, declare and state as follows:

1. I am over the age of 18 years, not a party to this case, and competent to testify to the matters stated herein.

2. I am a legal assistant with the Attorney General's Office in the Solicitor General Division.

3. On January 14, 2008, I caused to be served a copy of Response to Brief of Amicus Curiae Association of Washington Business to counsel of record, via first class mail, postage prepaid as follows:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct and of my own knowledge.

EXECUTED this 14th day of January, 2008, at Olympia, Washington.

Becky Waldron